IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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GENERAL ELECTRIC COMPANY.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

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American Society for Personnel Administration files this brief *amicus curiae* pursuant to the written consents of the parties hereto, which are on file with the Court as required by Supreme Court Rule 42.

INTEREST OF THE AMICUS CURIAE

The American Society for Personnel Administration (hereinafter "ASPA") is a non-profit professional society with approximately 16,000 members representing some 10,000 employing organizations in the private and public sectors. The employers include school districts, hospitals, municipalities and corporations, which together employ over 25 million people. ASPA's membership thus comprises a substantial and wide-ranging cross section of public and private employing organizations vitally concerned with personnel and industrial relations administration. ASPA conducts seminars, publishes magazines, and prepares research, surveys, and publications for its members on equal employment opportunity law and problems, occupational safety and health issues, salary policies, trends in employment of college graduates, and similar areas of current professional and social interest. ASPA has expressly committed itself to equal employment opportunity in its articles of social commitment, and is the only professional society with an affirmative action program directed to the placement of women and minorities in its paid and volunteer leadership positions.

ASPA's members are intimately involved in the formulation, funding and administration of employee benefit plans, which are a major component of the total employment costs borne by its members. It is ASPA's belief that an affirmance of the decision below will have a potentially disastrous impact on the benefit policies and employment budgets of these member organizations, and in many instances will further jeopardize their fiscal stability. Because of

this potentially devastating impact, and because ASPA's membership includes substantial segments of the public employer sphere—which has concerns and characteristics unique to itself, albeit similar to those of the private sphere—this brief *amicus curiae* is submitted.

ARGUMENT

The legal, philosophical and medical issues of this case have been presented to the Court by the parties and other *amici curiae*, and will not be reiterated herein. Rather, ASPA wishes to stress the severe financial impact on private and public employers which would result should this Court hold that pregnancy-related disabilities must be covered by sickness and accident disability insurance programs. In particular, ASPA will herein demonstrate the disastrous consequences that would follow to public employers who are already beset by massive financial and fiscal problems.

Compulsory Pregnancy Disability Benefits Would Have A Devastating Impact On Both Public and Private Employers.

Unrefuted actuarial testimony offered during trial in this case established that the annual cost of adding pregnancy disability coverage to existing disability benefit plans in the United States would be $1,353,000,000 (II App. 537; GE Ex. 42, III App. 848).[1] Another actuarial study estimated the total

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[1] References designated "I App. —" are to the Appendix filed by the parties in this case. This Appendix consists of four volumes and is paginated consecutively.

cost at between $1,005,000,000 and $1,620,000,000, depending on whether the benefit period was twenty or thirty weeks (GE Ex. 13, II App. 737-38). Moreover, these massive cost figures, covering some 32 million employees or, 40 percent of the United States work force under age 65, apply only to plans in effect in July 1973 (II App. 528-29; GE Ex. 42, III App. 846-49). The current estimated annual cost (assuming there has been no increase in the number of plans since July 1973) would rise to $1,634,424,000.[2]

The magnitude of these costs is further borne out by documented studies conducted by the American Telephone and Telegraph Company (hereinafter "AT&T") and the State of California.

AT&T has calculated that if normal pregnancy disabilities received disability insurance coverage in 1970-1971, its female employees, who comprised 49 percent of its work force, would have received 72 percent of the total disability benefit days. See Brief *Amicus Curiae* of AT&T filed in *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, *cert. granted*, 43 U.S.L.W. 3621 (May 27, 1975), p. 7, appendix

[2] This figure was calculated according to the increase in average hourly earnings (excluding overtime) of production workers on manufacturing payrolls. The percentage increase of 20.8 percent was found by ratioing the average per hour earnings for October 1973 (see Bureau of Labor Statistics Report, "Employment and Earnings," Vol. 20, No. 4, Oct. 1973, Table C-4) with the average per hour earnings for October 1975 (see Bureau of Labor Statistics Report, "Employment and Earnings," Vol. 22, No. 4, Oct. 1975, Table C-4). Multiplying the previously determined $1,353,000,000 figure by 20.8 percent produces the $1,634,424,000 figure.

pp. 6a-7a (hereinafter "AT&T *Amicus* Brief").[3] Had such coverage been made available for normal pregnancies in 1971-1972, AT&T female employees would have accounted for 71 percent of all disability benefit days, though constituting only 48 percent of the total AT&T work force (*Id.*). Indeed, according to AT&T calculations, system-wide costs for disability benefits in the Bell Telephone System alone would have increased by $15,762,663 in 1970-1971 and by $19,037,330 in 1971-1972 (*Id.*).

The State of California's calculations further corroborate the ravaging costs of including pregnancy disability under disability insurance plan coverage. Thus, California has estimated that the increased cost of including normal pregnancy within the risks covered by its disability insurance system for the employees of private employers would increase benefits paid out by from 33 percent to 36 percent. See *Geduldig* v. *Aiello*, 417 U.S. 484, 494 n. 18.

Further aggravating this cost problem is the fact that—even excluding pregnancy disability coverage completely—the present nationwide cost per unit of an accident and disability insurance benefit for a female employee is 170 percent of that for a male employee (II App. 635). Uncontradicted actuarial evidence adduced at the trial herein shows that adding full coverage for pregnancy disability would raise the per-unit benefit cost for the female employee to

[3] This figure assumes an average duration of 8 weeks for a normal pregnancy. However, estimates of the period of actual disability connected with normal pregnancy range from less than 6 weeks to 6 months (AT&T *Amicus* Brief, p. 6, appendix pp. 6a-7a).

330 percent of that for the male (*Id.*). The experience of AT&T confirms this estimate in concrete terms. Studies done on a representative survey group show that—exclusive of maternity absences—female employees show a greater frequency and severity rate in medical leaves than male employees. See, AT&T *Amicus* Brief, p. 5, appendix p. 4a.

Examination of the public sector reveals a strikingly similar experience. See, e.g., testimony of Herbert S. Deneberg, former Commissioner of Insurance for the State of Pennsylvania before the Joint Economic Committee of Congress:

> Disability coverage poses the most difficult problem [to unisex rates] as the loss experience of women, *even with pregnancy costs excluded*, may run two and a half times higher than costs for men.[4]

Similarly, before the State of Hawaii amended its state disability law to include pregnancy within the term "disability," [5] the premium rate for female employees was 23 percent higher than the male rate. However, after the State of Hawaii amended its state disability law in 1973 to include pregnancy within the term "disability," the premium rate for female employees was 142 percent higher than the male rate. See, Brief *Amicus Curiae* of American Mutual Insurance Alliance, National Association of

[4] Report of the Proceedings of the Hearings on the "Economic Problems of Women" before the Joint Economic Committee of Congress, Vol. 3 (July 12, 1973), p. 198; emphasis supplied.

[5] Hawaii Temporary Disability Insurance Low, 4 Haw.Rev. Stat., Title 21, §§ 392-3.

Independent Insurers, and American Insurance Association filed in *Liberty Mutual Insurance Co.* v. *Wetzel*, No. 74-1245, *supra*, p. 4.[6]

The massive costs generated by the inclusion of pregnancy disability benefits in employer sickness and accident disability insurance programs could lead to disastrous results for employers, especially for those in the public sector. Indeed, an increase at this time in costs of the magnitude contemplated in this case could well wreak havoc on numerous municipalities, school districts and other public employers whose fiscal integrity and liquidity are already undergoing the greatest combined pressures and strains faced in many years.

As stated recently by one commentator:

> City after city across the United States is finding itself caught in a financial vise—and the pressure is tightening almost daily.[7]

Indeed, some of the nation's largest cities, including St. Louis, New Orleans and Cleveland, are close to bankruptcy.[8] As stated earlier this year in *Business Week*:

[6] See also, the experience of the State of Rhode Island discussed in Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 N.Y.L.F. 480, 485 (1971). Beginning in 1943, Rhode Island included pregnancy within the definition of "disability" in its state disability insurance plan. By 1949-1950 pregnancy benefit claims constituted 22.62 percent of all benefit claims and 30.4 percent of all benefits paid.

[7] "New Squeeze on Cities," *U.S. News & World Report*, August 18, 1975, p. 11.

[8] "Cities in Peril," *U.S. News & World Report*, April 7, 1975, pp. 29-36. See also "Mayors Survey: Cities Face Huge Fiscal Gaps," *The American City*, May 1975, p. 26.

> New York City may be the municipality with the best-publicized set of financial woes, but it is by no means the only one in bad shape.[9]

In the last ten years, combined debts of the nation's local governments have climbed from $103 billion to $209 billion as spending outran tax receipts.[10] Indeed, owners of municipal bonds saw the value of their holdings drop by $12 billion in the scant five-month period between March and August, 1975,[11] while municipality after municipality has seen its bond rating downgraded,[12] and public borrowers have been forced to raise their interest rates to exorbitantly high levels.[13]

The results of this fiscal crunch are felt in many ways short of the ultimate impact of collapse. A recent survey by the National League of Cities found

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[9] "The Underwriters Grow Wary of City Issues," *Business Week*, July 7, 1975, pp. 56-57 (citing Cleveland, Detroit, Newark and the Commonwealth of Puerto Rico). See also "More States Turn to Gambling to Raise Money in Hard Times," *U.S. News & World Report*, June 30, 1975, pp. 22-23; "Going Broke the New York Way," *Fortune*, August 1975, pp. 144-49; "City and Suburb: The Anatomy of Fiscal Dilemma," *Land Economics*, May 1975, pp. 133-38.

[10] "Uncle Sam Can Bail Out New York, But Who Will Bail Out Uncle Sam?", *Forbes*, July 1, 1975, pp. 42-43.

[11] "Shock Waves in the Bond Market," *U.S. News & World Report*, August 18, 1975, p. 12.

[12] "The Underwriters Grow Wary of City Issues," *Business Week*, July 7, 1975, pp. 56-57.

[13] Vartan, "Shadows of City's Fiscal Ills Darken Bond Market for Other Municipalities," *New York Times*, August 24, 1975, p. 16, col. 6 (city ed.).

that 43 of 67 cities surveyed expected revenue shortfalls in 1975; 42 expected to raise taxes, cut services or both; 36 were postponing capital improvements, and 21 reported job layoffs and hiring freezes.[14]

Indeed, it is not surprising that increasing numbers of states, cities, and other public employers are seeking to ameliorate their fiscal plights through easing employment budgets and outlays, since labor costs constitute the most significant cost item for many local governments.[15] To impose an additional labor cost of millions of dollars on the already financially strained local and state governments at this time could well, we submit, lead to a further deepening of the financial crisis.

CONCLUSION

If the decision below is affirmed by this Court, thousands of employers across the nation—private and public alike—face an imemdiate and enormous increase in their employment costs. Such increase will intensify an already disproportionate imbalance in disability insurance plan coverage costs between the sexes, and a substantial part thereof will be diverted from those persons intended to be benefitted by disability plans, i.e., those persons temporarily unable to work because of involuntarily incurred illness or accident. The impact of these dramatic, over-

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[14] "The Crunch on City and State Budgets," *Business Week*, March 10, 1975, pp. 78-79. See also, Shanahan, "Many Cities in Crisis Cut Payrolls and Raise Taxes," *New York Times*, May 27, 1975, Sect. 1, p. 1, col. 1 (city ed.).

[15] Raskin "Much More Labor Strife is Just Ahead," *New York Times*, August 24, 1975, p. 1, col. 3 (city ed.).

night increases is, therefore, potentially staggering for both public and private employers. For these reasons, as well as those stated by Petitioner General Electric Company, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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